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VIA ELECTRONIC FILING

Acting Chairwoman Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Ex Parte Presentation
***Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269;**
***Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268**

Dear Acting Chairwoman Clyburn and Commissioners Rosenworcel and Pai:

On behalf of T-Mobile USA, Inc. ("T-Mobile"), I hereby submit this letter in support of the recently filed *Ex Parte* Submission of the United States Department of Justice (the "Department") in the above-referenced proceeding.[1] The Department's *Ex Parte* correctly observes and emphasizes that "competition-focused rules for spectrum acquisitions, particularly in auctions, would best serve the dual goals of putting spectrum to use quickly and promoting consumer welfare in wireless markets."[2] Specifically, "the Department concludes that rules that ensure the smaller nationwide networks, which currently lack substantial low-frequency spectrum, have an opportunity to acquire such spectrum could improve the competitive dynamic among nationwide carriers and benefit consumers."[3]

From 2005-2013 it was my privilege to serve the people of the State of Washington as their Attorney General. I was also privileged and honored to serve as president of the National Association of Attorneys General ("NAAG") from 2011-12; in a number of other NAAG leadership positions before that; and as Chairman of the Republican Attorneys General Association for a total of three years. In 2012, my NAAG colleagues honored me with the Kelley-Wyman Award for Outstanding Attorney General in America.

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[1] *See Ex Parte* Submission of the United States Department of Justice, WT Docket No. 12-269 (Apr. 11, 2013) ("Department's *Ex Parte*").
[2] *Id.* at 1.
[3] *Id.*

I was deeply involved in antitrust and consumer protection matters throughout my years of service. State attorney general authority to protect competition repeatedly has been recognized and upheld by the United States Supreme Court,[4] originally under the Clayton Act,[5] and more recently as authorized by Congress in the Hart-Scott-Rodino Antitrust Improvements Act.[6] State attorneys general are regularly involved in the review of proposed mergers, and federal law makes the United States Attorney General responsible for notifying the State attorneys general when the Department is investigating a potential antitrust violation and has reason to believe that the State attorneys general might wish to bring a *parens patriae* action against that same conduct.

The State attorneys general have been very active in protecting competition in the wireless industry. For example, in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438 (2009), nine States reminded the Supreme Court that "Competition ultimately benefits consumers in the form of lower prices, higher quality, and larger selection."[7] And, in case after case, the states consistently have argued against excessive concentration of market power in the wireless telephone market, successfully obtaining asset divestiture as a pre-condition for merger approval.[8]

Raising competitors' costs by restricting supply of a critical input can be just as detrimental an exercise of market power by a dominant entity as raising and sustaining prices above competitive levels by restricting output.[9] Indeed, restricting inputs may even be more effective and damaging than restricting output because once competitors' costs are increased, these competitors will provide a less effective constraint on supra-competitive pricing by the dominant players. In one example that involved my state, the Washington Attorney General's office and that of several other state attorneys general observed an entity restricting access to inputs in the energy market,

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[4] *See, e.g., Georgia v. Pa. R.R. Co.*, 324 U.S. 439 (1945); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).

[5] 15 U.S.C. § 16 (1914). *See also New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 150 (D.D.C. 2002) ("It is beyond dispute that federal antitrust law, specifically Section 16 of the Clayton Act, provides statutory authorization for claims brought by a state in its capacity as *parens patriae*." (citing *Georgia v. Pa. R.R. Co.*, 324 U.S. at 447.))

[6] 15 U.S.C. § 15c.

[7] Brief of the Commonwealth of Virginia and Eight Other States as Amici Curiae at 3, *Pac. Bell Tel. Co. v. Linkline Commc'n, Inc.* No. 07-512 (Sept. 4, 2008). Occasionally, groups of State attorneys general will be on opposite sides of a proposed merger, as occurred in *Covad Commc'ns Co. v. Bell Atl. Corp.*, 398 F.3d 666, *reh'g denied*, 407 F.3d 1220 (D.C. Cir. 2005) where Virginia and New York filed opposing briefs.

[8] *See, e.g., U.S. v. Cingular Wireless Corp.*, No. 1:04-cv-01850 (D.D.C. 2004); *U.S. v. Verizon Commc'n, Inc.*, No. 1:08-cv-01878 (D.D.C. 2008).

[9] The courts have recognized the anticompetitive nature of restricting access to a critical resource under the "essential facilities" doctrine. *See, e.g., Gregory v. Fort Bridger Rendezvous Ass'n*, 448 F.3d 1195, 1204 (10th Cir. 2006) (describing the doctrine as imposing upon "a business or group of businesses which controls a scarce facility...an obligation to give competitors reasonable access to it"); *see also In re Air Passenger Computer Reservations Sys. Antitrust Litig.*, 694 F.Supp. 1443, 1451-52 (C.D. Calif. 1988) (discussing cases brought under this doctrine). The Supreme Court has examined the essential facilities doctrine, and although it has not yet recognized it, has found "no need...to repudiate" the doctrine. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004).

and took action by entering into a settlement with the alleged monopolist that protected consumers and the competitiveness of that marketplace.[10]

The present proceeding presents the same kind of potential damaging risk for consumers and competition. Failing to prevent excessive concentration in the low-frequency spectrum resources wireless companies need to compete threatens to further concentrate market power in the hands of the two largest wireless providers and make wireless competition far less robust. The Department's *Ex Parte* succinctly states the challenge facing the Commission in this process, correctly arguing that spectrum auctions should "set the stage for the wireless industry to innovate and for consumers to fully realize the benefits of competition."[11] But "due to the scarcity of spectrum, the Department is concerned that carriers may have incentives to acquire spectrum for purposes other than efficiently expanding their own capacity or services."[12]

These incentives are described in detail in the white paper submitted in this docket by Professor Jonathan Baker, who explains the risks posed to smaller carriers and their customers by an auction process that lacks reasonable limits on spectrum acquisition by one or two large carriers: "When spectrum ownership is concentrated, firms may be able to exercise market power downstream in the provision of services that use wireless spectrum as an input. Large incumbent firms that recognize this prospect may have an incentive and ability to obtain or maintain downstream market power by keeping spectrum away from their rivals."[13]

This is exactly the concern expressed to the Commission by the Computer & Communications Industry Association and others, who wrote that "allowing the two largest wireless carriers to acquire all or nearly all available 600 MHz spectrum would further concentrate their holdings of scarce low-frequency spectrum resources, which, in turn, would stifle broadband competition, stymie broadband innovation, and reduce incentives for broadband deployment."[14]

Such a result would be contrary to the pro-competitive approach of both Republican and Democratic attorneys general over many decades, as well as to the approach that is clearly favored by Congress in its enactments which lay out the approach it wishes the Commission to take in reviewing spectrum license applications. Congress requires the Commission to protect

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[10] *See, e.g.*, "States, El Paso Settle Energy Investigation," News Release, Washington State Office of the Attorney General (June 26, 2003), *available at* http://www.atg.wa.gov/pressrelease.aspx?&id=5896#.UdcLHTtQHo8 (last visited July 5, 2013) (reporting that Washington and several other states had entered into a $21.3 million settlement agreement with the El Paso energy company in response to claims that it had used its control of a critical pipeline to manipulate prices for the natural gas market); *see also E. & J. Gallo Winery v. Encana Energy Servs., Inc.*, 388 F. Supp. 2d 1148, 1152-53 (E.D. Calif. 2005) (recounting procedural history of the El Paso settlement).

[11] Department's *Ex Parte* at 9.

[12] *Id.* at 10.

[13] Jonathan B. Baker, *Spectrum Auction Rules That Foster Mobile Wireless Competition*, WT Docket No. 12-269 (Mar. 12, 2013), at 3.

[14] *Ex Parte Presentation* of C Spire Wireless, Computer & Communications Industry Association, *et al.*, WT Docket No. 12-269 (May 20, 2013), at 1-2.

competition and prevent over-concentration "by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants."[15]

The approach recommended in the Department's *Ex Parte* will best protect competition and avoid over-concentration of spectrum ownership, even as the newly available low-frequency wireless spectrum is quickly put to use to the benefit of wireless customers. The approach is well-grounded in law and sound, pro-competitive public policy.

Respectfully submitted,

Robert M. McKenna

[15] 47 USC § 309(j)(3)(B).